UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

In re DYNAMIC RANDOM ACCESS MEMORY (DRAM) ANTITRUST LITIGATION
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No. M 02-1486 PJH

ORDER GRANTING SUMMARY JUDGMENT IN PART AND DENYING SUMMARY JUDGMENT IN PART

This Document Relates to:

All Direct Purchaser Actions
_____/

Defendants' motions for summary judgment came on for hearing on January 10, 2007 before this court. Plaintiffs, the direct purchaser class ("plaintiffs"), appeared through their class counsel, Guido Saveri, Anthony Shapiro, Fred T. Isquith, R. Alexander Saveri, Frank A. Bottini, Bruce L. Simon, George W. Sampson, Geoffrey C. Rushing, and Clinton P. Walker. Defendants appeared through their counsel, Paul R. Griffin, Robert B. Pringle, Robert E. Freitas, Na'il Benjamin, Howard Ullman, Joel S. Sanders, Ronald C. Redcay, William M. Goodman, Stephen V. Bomse, Harrison J. Frahn, William S. Farmer, and Steven H. Morrissett. Having read all the papers submitted and carefully considered the relevant legal authority, the court hereby GRANTS the motions for summary judgment in part and DENIES the motions for summary judgment in part, for the reasons stated at the hearing, and as follows.

BACKGROUND

The instant action is part of a larger multidistrict litigation proceeding, and arises under section 1 of the Sherman Act.

A. Background Facts

Dynamic random access memory ("DRAM") is an electronic memory microchip that

is used to store digital information and provide high-speed storage and retrieval of data. DRAM is commonly used in a wide assortment of electronic devices, including personal computers, printers, digital cameras, and wireless telephones. It is also the most common kind of random access memory chip sold in both new computers and computer upgrades in the United States. DRAM is primarily sold in two forms, component and module, both of which come in different densities, speeds, and frequencies. The defendants[1] in the instant action are all engaged in the manufacture and/or sale of DRAM on the worldwide market. Collectively, they are the leading manufacturers of DRAM, and control the majority of the DRAM market.

Beginning in May 2002, the Antitrust Division of the Department of Justice ("DOJ") began investigating the existence of price-fixing in the DRAM industry – specifically, the existence of a conspiracy to restrict supply and raise prices for DRAM among the largest makers and sellers of DRAM globally. Several defendants were targeted by the DOJ as part of this larger investigation. As a result of the investigation, four defendants – Infineon, Hynix, Samsung, and Elpida – have pled guilty to participation in a price-fixing conspiracy in violation of federal antitrust law. In addition, several of their employees and agents have also pled guilty to criminal antitrust violations, and have been sentenced accordingly.

B. The Instant Action

On June 21, 2002, on the heels of the DOJ's antitrust investigation, plaintiffs filed a

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[1] Defendants are: Micron Technology, Inc., and Micron Semiconductor Products, Inc. (collectively "Micron"); Infineon Technologies AG, and Infineon Technologies North America Corp. (collectively "Infineon"); Hynix Semiconductor, Inc., and Hynix Semiconductor America, Inc. (collectively "Hynix"); Samsung Electronics Co., Ltd., and Samsung Semiconductor, Inc. (collectively "Samsung"); Mosel-Vitelic Corporation, and Mosel-Vitelic Corporation (USA)(collectively "Mosel-Vitelic"); Nanya Technology Corporation, and Nanya Technology Corporation USA ("NTC" and "NTC USA," respectively); Winbond Electronics Corporation, and Winbond Electronics Corporation America (collectively "Winbond"); Elpida Memory, Inc., and Elpida Memory (USA) Inc. (collectively "Elpida"); and NEC Electronics America, Inc. ("NEC"). To date, however, seven of these nine defendant groupings have entered into settlement agreements with plaintiffs. Accordingly, only two defendant entities remain, and proceed before the court here on the instant motions for summary judgment – Nanya, and Mosel-Vitelic.

class action lawsuit in the Southern District of New York, alleging federal antitrust violations by defendants. Plaintiffs are a class comprised of all persons and/or entities who purchased DRAM in the United States market directly from defendants during the period April 1, 1999 through June 30, 2002 (the "class period"). The original action, along with numerous subsequently-filed actions, was later transferred to this court for consolidated pre-trial proceedings, pursuant to the multidistrict litigation ("MDL") procedures set forth in 28 U.S.C. § 1407. After the cases were transferred and consolidated, plaintiffs filed a consolidated class action complaint on October 1, 2003. The most recent and operative complaint – the Third Consolidated Amended Class Action Complaint – was filed on June 30, 2005.

In their complaint, plaintiffs generally allege that defendants engaged in a global conspiracy to "fix, raise, maintain and stabilize the prices of, and/or allocate the market for, DRAM they sold in the United States" during the class period, and that plaintiffs were injured by this activity when they were forced to pay artificially inflated prices for DRAM. See, e.g.,Third Consolidated Amended Class Action Complaint ("Complaint"), ¶¶ 2, 55, 61-65, 73-74. As part of that conspiracy, plaintiffs allege that the defendants participated in meetings and conversations to discuss the price of DRAM; agreed to manipulate prices and supply so as to boost sagging DRAM sales; issued price announcements and price quotations in accordance with the agreements reached by defendants; and sold DRAM to customers in the United States at non-competitive prices. See id. at ¶ 64.

Now post-discovery, plaintiffs present these allegations in more concrete form. In sum, they assert that defendants effectuated the alleged price-fixing conspiracy in two ways: first, plaintiffs allege that defendants coordinated an industry-wide reduction in DRAM production, or else created the appearance of such a reduction, in order create an artificial DRAM shortage that would ultimately drive up the price of DRAM on the US market. See, e.g., Pl. Opp. Br. re Nanya MSJ at 2:23-3:8. Second, plaintiffs contend that, in connection with creating a supply shortage that would have the effect of increasing the

market price for DRAM, the defendants coordinated with each other – through frequent high-level communications and meetings – to raise and keep the DRAM prices artificially high to all DRAM purchasers. See id. at 3:9-16. All these actions, assert plaintiffs, resulted in harm to DRAM purchasers, and render defendants liable to those purchasers under the Sherman Act.

C. The Instant Motions

The remaining defendants in this action now move for summary judgment. There are four motions in total, as follows: (1) Nanya Technology Corporation's ("NTC") motion to determine liability under the Sherman Act; (2) Nanya Technology Corporation USA's ("NTC USA") companion motion to determine liability under the Sherman Act; (3) defendants' motion for partial summary judgment based on pre-existing cost-plus contract purchases; and (4) defendants' motion for partial summary judgment based on DRAM purchases from April 1, 2001 to November 30, 2001. In addition, the parties have both filed motions to seal certain documents.

DISCUSSION

A. Summary Judgment Standard

Generally speaking, normal summary judgment standards apply. That is to say, summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The court must view the facts in the light most favorable to the non-moving party and give it the benefit of all reasonable inferences to be drawn from those facts. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

Where, as here, concerted price-fixing is alleged, the plaintiffs bear the ultimate burden of presenting sufficient evidence to prove that an agreement to fix prices existed. See, e.g., In re Citric Acid Litig., 191 F.3d 1090, 1093 (9th Cir. 1999)(noting that price-fixing

is a per se violation of section 1 of the Sherman Act). In order for them to survive defendants' motion for summary judgment, therefore, plaintiffs must establish that there is a genuine issue of material fact as to whether defendants entered into an illegal conspiracy that caused respondents to suffer a cognizable injury. See Matsushita, 475 U.S. at 585-86. Plaintiffs can establish a genuine issue of material fact by producing either direct evidence that defendants participated in an agreement to fix prices, or circumstantial evidence from which a reasonable fact finder could conclude the same. See, e.g.,Movie 1 & 2 v. United Artists Commc'ns, 909 F.2d 1245, 1251-52 (9th Cir. 1990); United States v. Gen. Motors Corp., 384 U.S. 127, 142-43 (1966).

With respect to proof by way of circumstantial evidence in section 1 cases, special rules apply. In Matsushita Elec. Indus. Co., the Supreme Court noted that "antitrust law limits the range of permissible inferences from ambiguous evidence in a [section 1] case...". See 475 U.S. at 588. In addressing plaintiff's burden in proving that an issue of material fact exists on the conspiracy question, the court stated, "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy...". See id. In sum, to survive a motion for summary judgment, "a plaintiff seeking damages for a violation of [section] 1 must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently ...." Id.

The Ninth Circuit has embraced Matsushita and has outlined a two-part test to be applied whenever a plaintiff rests its case entirely on circumstantial evidence. First, the defendant can rebut an allegation of conspiracy by showing a plausible and justifiable reason for its conduct that is consistent with proper business practice. Second, the burden then "shifts back to the plaintiff to provide specific evidence tending to show that the defendant was not engaging in permissible competitive behavior." See, e.g., In re Citric Acid Litig., 191 F.3d at 1094.

These standards apply here, to the extent that plaintiffs seek to defeat summary

judgment as to section 1 liability on the basis of circumstantial evidence, whether in whole or in part.

The court now turns to the four summary judgment motions before it, and addresses each in turn.

B. NTC's Motion for Summary Judgment

NTC attacks plaintiffs' ability to prove that NTC – as distinguished from its subsidiary, NTC USA – is liable for participation in any agreement to fix prices, reduce output, or engage in any other prohibited activity under section 1 of the Sherman Act. Focusing on its own conduct, NTC argues that plaintiffs cannot prove either (1) that NTC itself is guilty of any unlawful activity, or (2) that NTC is guilty as a co-conspirator, by virtue of its' participation in *other* defendants' unlawful activities. In response, plaintiffs marshal what they claim is both direct and circumstantial evidence of NTC's participation in the alleged section 1 conspiracy.

Regardless of the parties' differing characterizations of their arguments – i.e., conduct v. nature of evidentiary proof – the fundamental issue raised by the parties is the same: whether there is sufficient direct and/or circumstantial evidence to create a triable issue of fact as to whether NTC participated in the alleged conspiracy to "fix", via output reduction and/or price manipulation, the market for DRAM. In analyzing this issue, the court must consider: (1) the preliminary issue whether plaintiffs may attempt to create a triable issue as to NTC's participation in the overarching conspiracy vis-a-vis NTC's relationship with its wholly owned subsidiary, NTC USA; (2) the direct evidence of NTC's participation in the alleged conspiracy; and (3) the circumstantial evidence of NTC's participation in the same.

1. NTC's Vicarious Liability Based on Relationship with NTC USA

NTC claims that it has a separate legal existence from its wholly owned subsidiary, NTC USA, and that NTC has not engaged in any direct sales of DRAM within the United States since 1998, the year after NTC USA was incorporated. See Declaration of Kenneth

M. Hurley ("Hurley Decl."), ¶ 2. In view of this distinction, NTC asserts that plaintiffs cannot offer evidence of NTC USA's conduct in attempting to create a material dispute with respect to NTC's participation in any unlawful activity. See NTC MSJ Op. Br. at 4:18-7:14. Specifically, NTC argues: (1) that under principles of basic corporate law, a parent corporation is not liable for the acts of its subsidiary; (2) that plaintiffs have not and cannot establish liability through an alter ego theory; (3) that vicarious liability also may not be established through the "single entity" doctrine applicable to antitrust cases; and (4) that, even assuming that NTC USA participated in any unlawful acts, there is no evidence that NTC knowingly participated in those unlawful acts. Plaintiffs challenge these contentions, asserting that the evidence of NTC's individual participation in the alleged conspiracy is plentiful, but even if it weren't, NTC could still be found vicariously liable based on NTC USA's conduct, since NTC is the alter ego and marketing conduit for NTC USA.

First, NTC is generally correct that corporate law prohibits a parent corporation from being held liable on the basis of its subsidiary's actions. See, e.g., U.S. v. Bestfoods, 524 U.S. 51 (1998)("It is a general principle of corporate law deeply 'ingrained in our economic and legal systems' that a parent corporation (so-called because of control through ownership of another corporation's stock) is not liable for the acts of its subsidiaries."). However, a parent corporation *may* be held liable for the acts of its subsidiary "where stock ownership has been resorted to, not for the purpose of participating in the affairs of a corporation in the normal and usual manner, but for the purpose of controlling a subsidiary company so that it may be used as a mere agency or instrumentality of the owning company." See id. at 62-63. Accordingly, NTC may be held vicariously liable for NTC USA's actions, but only if plaintiffs can establish that NTC USA is a mere 'agency or instrumentality' of NTC's.

This brings the court to NTC's second argument, for plaintiffs have chosen to rely on the alter-ego doctrine as an independent theory that would justify the imposition of vicarious liability here. In order to prove that the alter-ego theory applies, plaintiffs must show that

there is "such unity of interest and ownership that the separate personalities [of the two entities] no longer exist." See Doe v. Unocal Corp., 248 F.3d 915 (9th Cir. 2001). An alter ego or agency relationship is specifically proven up by facts that demonstrate "parental control of the subsidiary's internal affairs or daily operations." See Doe, 248 F.3d at 927 (alter ego test also satisfied where the record indicates that the parent dictates "[e]very facet [of the subsidiary's] business - from broad policy decisions to routine matters of day-to-day operation [.]").

Here, plaintiffs attempt to satisfy the alter-ego test by showing that NTC had full operational control over NTC USA and owned 100% of its stock; that NTC manufactured all the DRAM sold by NTC USA; that certain of NTC USA's officers reported directly to NTC; that two of the three directors on NTC USA's board of directors were from NTC; that NTC had ultimate authority over, and made, all of NTC USA's pricing decisions; and that NTC was merely NTC USA's "marketing conduit" during the alleged time period. See Opp. Br. at 32:23-33:7.

The undisputed evidence that plaintiffs rely on, however, discloses only that NTC USA's president, Kenneth Hurley, reported directly to NTC officers; that NTC USA's executives had orders not to deviate from pricing policies set by NTC; and that NTC in fact set the pricing policies that drove NTC USA's DRAM prices. See Declaration of George Sampson in Support of Oppositions ("Sampson Decl."), Exs. 104 at 22:13-16, 23:17-19, 24:18-27:24; 105 at 14; see also Plaintiffs' Slide Presentation in Opp. to NTC MSJ at 36. Even combining this evidence with NTC's undisputed evidence that NTC USA is, in fact, wholly owned by NTC, this evidence is insufficient to prove that NTC USA is NTC's alter ego. See, e.g., Hurley Decl., ¶ 1. This is because the evidence as a whole does not sufficiently speak to whether NTC actually controls the day to day operations and internal affairs of NTC USA, even if NTC does control decisions regarding pricing, nor does it demonstrate that NTC dictates "every facet of NTC USA's business." In the absence of evidence establishing these factors, the alter ego theory is unavailable to plaintiffs as a

means of holding NTC vicariously liable for NTC USA's actions.[2]

Nor can plaintiffs demonstrate NTC's liability on the basis of NTC USA's conduct through application of the single entity doctrine. That doctrine, announced in Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 771 (1984), holds that parent and subsidiary corporations are to be considered a single collective entity for purposes of conspiracy liability under section 1 of the Sherman Act, and as such, they are incapable of conspiring together under the Act. The doctrine, however, is inapplicable here. Although it deals with the question whether a parent and subsidiary corporation may be charged with conspiring with each other, it says nothing about whether a parent and subsidiary may, collectively or individually, be charged with conspiring with *other* unaffiliated members of an alleged conspiracy. That is the issue before this court. As such, the doctrine cannot be used to invoke NTC's liability with respect to the global conspiracy alleged by plaintiffs.

Finally, NTC argues that no liability can possibly exist via NTC USA, because there are no ties connecting NTC to any unlawful activity by NTC USA, to the extent NTC USA engaged in such activity. NTC USA acted independently, posits NTC, and without NTC's participation. In making this argument, NTC preemptively targets the deposition testimony of Steven Hsu, an NTC USA employee, arguing that his testimony – which confirms NTC's influence over NTC USA's pricing policies – cannot be used to demonstrate NTC's participation in NTC USA's allegedly unlawful activity. Plaintiffs, for their part, fail to rebut NTC's argument in this regard, and they rely on Hsu's testimony for proof of alter ego liability only. In the absence of argument by plaintiffs, the court finds, as NTC urges, that Mr. Hsu's testimony standing alone does not form the basis for vicarious liability.

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[2] Plaintiffs also drop a footnote in their opposition brief, and further argued at the hearing on this matter, that NTC "could also be held vicariously liable for the acts of [NTC USA] under an agency theory," as distinguished from an alter ego theory. See Opp. Br. at 33 fn. 27. Plaintiffs cited no evidence in support of this assertion, however, relying only on the bald assumption that "without [NTC USA], the parent company [NTC] would have to perform" the marketing and sales functions that Nanya USA engages in. Such conclusory argument, with no supporting evidence, is unpersuasive, and the court declines plaintiffs' invitation to find an agency theory of liability applicable to NTC on the record before it.

In conclusion, the court finds that plaintiffs have not created a triable issue of material fact with respect to NTC's vicarious liability for the overarching conspiracy alleged by plaintiffs, on the basis of its relationship with NTC USA. NTC's participation in the alleged overarching conspiracy must be independently proven, either through direct or circumstantial evidence.

2. Direct Evidence of Conspiracy

NTC asserts that there is a general absence of any evidence proving that it (a) participated in a price-fixing agreement with other defendants; (b) reduced its DRAM output in order to drive up prices for DRAM; or (c) engaged in any exchange of price information with any competitor that resulted in an increase or stabilization of market prices.[3] See NTC Op. Br. at 8-13. Plaintiffs, however, assert that there is sufficient direct evidence of NTC's participation in the alleged conspiracy to raise a genuine issue of material fact on the issue. See In re Citric Acid Litig., 191 F.3d at 1093 (where a plaintiff produces direct evidence that a defendant entered into an illegal price-fixing agreement, summary judgment will be denied).

Direct evidence in a section 1 conspiracy case "must be evidence that is explicit and requires no inferences to establish the proposition or conclusion being asserted." See id. at 1094, citing In re Baby Food Antitrust Litig., 166 F.3d 112, 118 (3d Cir. 1999). Here, plaintiffs contend that they have direct evidence that NTC participated in secret price-fixing meetings with its competitors to discuss DRAM pricing and to coordinate output reduction, and furthermore, that NTC did in fact reduce its DRAM production.

a. emails

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[3] NTC also makes the somewhat baffling argument that it does not stand accused of price fixing. Plaintiffs' complaint explicitly charges that defendant – among others – entered into a contract, combination or conspiracy to unreasonably restrain trade, the substantial terms of which were to fix and maintain the price for DRAM. See Third Consolidated Amended Complaint, ¶¶ 61, 63. It is difficult to conclude from this that NTC does not stand "accused" of price fixing, for it is clear from the complaint that this is precisely what plaintiffs accuse. To the extent, however, that NTC really means simply that plaintiffs have not successfully *proven* the actual existence of any agreement to actually fix prices, this argument is dealt with in the body of this section.

Plaintiffs claim that secret meetings among the defendants, including NTC, took place in June and July 2001. For the June meeting(s), plaintiffs first rely on email communications sent in June 2001 by defendant Micron's Managing Director of International Sales, Linda Turner, in which Ms. Turner reports that "the Taiwanese DRAM dudes are pow-wowing next week on how to set a floor" regarding DRAM price, and notes that "Sammy/Infineon/Hynix have had pricing discussions recently." See Sampson Decl., Ex. 14, 15. With respect to the alleged July 2001 meeting(s), plaintiffs point to a July 2001 bulletin to which all DRAM manufacturers subscribe (forwarded via email), which reported that there was "a secret meeting hosted by Taiwanese DRAM companies in Taipei in early July to coordinate a cut in output or at least try to hold the line on prices." See id. at Ex. 86. Although neither source specifically refers to either NTC or NTC USA, plaintiffs contend by way of a separate article identifying NTC as a "local DRAM die manufacturer" that NTC qualifies as one of the "Taiwanese" entities referred to in the above exhibits. See id. at Ex. 85.

This evidence is neither direct nor persuasive. Preliminarily, the court notes that NTC has objected to each of the above exhibits submitted by plaintiffs, on grounds that each constitutes impermissible hearsay. NTC is correct. Plaintiffs are seeking to introduce out of court statements contained in individual emails and industry news bulletins, noting the existence of so-called secret meetings between Taiwanese DRAM manufacturers, as proof that the meetings actually took place. This constitutes hearsay under Federal Rule of Evidence 801(c). Plaintiffs attempt to overcome the objections by invoking the co-conspirator provision to Rule 801, which refuses to qualify as hearsay the statements made by co-conspirators of a party during the course and in furtherance of the conspiracy. See Fed. R. Evid. 801(d)(2)(E); see also Bourjaily v. United States, 483 U.S. 171, 175-81 (1987). However, as Bourjaily and the Ninth Circuit's subsequent interpretation of that case in United States v. Silverman make clear, in order for such statements to be admissible, there must be evidence beyond the statements in question, that demonstrate by a

preponderance of the evidence the underlying conspiracy and NTC's connection to it. Silverman, 861 F.2d 571, 576 (9th Cir. 1988); see also United States v. Tamez, 941 F.2d 770 (9th Cir. 1991). Here, plaintiffs do not attempt to argue, and the court does not attempt to scour the record for, the existence of any such independent evidence that would satisfy the Silverman and Tamez standards. As such, the hearsay objections lodged by NTC to the above exhibits are sustained. Furthermore, to the extent that plaintiffs would attempt to meet their burden in establishing the co-conspirator definition under FRE 801(d)(2)(E) by pointing to other sources of evidence that may itself be subject to hearsay objections, the court would find such attempts similarly unpersuasive.

Moreover, even if the court did not sustain NTC's objections herein, the evidence would still not prove persuasive as direct evidence of NTC's participation in secret meetings to fix DRAM prices. Ms. Turner, for example, was a *Micron* employee, not an NTC employee, thereby diminishing the directness of the evidence as far as NTC is concerned. But even if her emails were considered as direct evidence of NTC's own actions, the emails are simply not dispositive of NTC's participation in any agreement or conspiracy. Ms. Turner states in one of her emails only that "the Taiwanese DRAM dudes" will be meeting. Sampson Decl., Ex. 15. She never references NTC specifically, but only defendants Samsung, Infineon and Hynix. And in her second email, while Ms. Turner states that she has "heard rumors from one of the Taiwan DRAM makers that there is a meeting scheduled with all of the Taiwan DRAM makers over the next week to discuss raising their pricing," there is again no mention of NTC specifically, just an allegation of a "rumor" told to Ms. Turner by an unnamed "Taiwan DRAM maker." See Sampson Decl., Ex. 14.

In short, this evidence is not explicit, and would require that the court make certain inferences unsupported by the record to conclude that NTC participated in any of the alleged secret meetings, or for that matter in the conspiracy. Accordingly, the court concludes that the emails are not direct evidence sufficient to defeat NTC's motion for summary judgment.

b. Mr. Kau's testimony

Plaintiffs also rely on the deposition testimony of NTC Vice President Charles Kau, as direct evidence that NTC participated in meetings and discussions with its Taiwanese rivals regarding a DRAM production cut. According to plaintiffs, Mr. Kau testified that there was a local conference that took place around 2001, at which he recalls discussing a DRAM production cut with NTC's competitors. See Sampson Decl., Ex. 88 at 107:14-24.

Here, too, however, plaintiffs' reliance on this testimony as direct evidence of NTC's participation in secret meetings to raise DRAM prices or cut production, is misplaced. For as NTC points out, plaintiffs have completely – and disingenuously – omitted Mr. Kau's follow-up explanation with respect to the very statement upon which plaintiffs rely. To wit, when asked during follow-up deposition questioning about the 2001 conference at which the production cut was discussed, Mr. Kau clarified that, while a discussion was in fact raised about reducing DRAM output, the discussion was also immediately halted when someone present during the discussion noted that cutting production would be illegal. See Benjamin Reply Decl., Ex. A at 160-161. Mr. Kau then went on to testify that, at any rate, NTC did not reduce production following that discussion. Id.

In view of the complete testimony offered by Mr. Kau on the subject, Mr. Kau's statements cannot be considered direct evidence of NTC's involvement in meetings to fix DRAM prices or to cut production of DRAM in order to raise DRAM prices.

c. industry news and articles

Finally, plaintiffs rely on a series of three news articles written in 2001, in which Mr. Kau was quoted, and that refer to discussions about joint efforts by defendants to cut DRAM production. See Opp. Br. at 10:20-21. First, on August 14, 2001, an EBN article entitled "Taiwan DRAM makers may cut output" was published, in which Mr. Kau is quoted as stating that NTC is "willing to cooperate" in a production cut. See Sampson Decl., Ex. 22. Second, on October 1, 2001, a Financial Times article entitled "Nanya raises the prospect of cuts in DRAM output," quoted Mr. Kau as saying that NTC was "willing to cut

production voluntarily, once we have got the right signal." See id. at Ex. 23. Finally, in a separate Financial Times article also dated October 1, 2001, Mr. Kau purportedly stated that "Taiwanese strategies include ... exploring the possibility of joint production cuts...", and he furthermore joked that the DRAM industry might one day be called "D-Pec," like the "Global oil cartel OPEC." See id. at Ex. 24; see also Ex. 88 at 125:6-127:23.

Preliminarily, as with the emails discussed above, NTC has raised hearsay objections to the three articles in question. Plaintiffs seek to use statements in each article attributed to Mr. Kau, to the effect that NTC was willing to participate in joint efforts to cut DRAM production. In the court's view, plaintiffs offer Mr. Kau's statements for the truth of the matter asserted therein, and as such, the statements uttered by Mr. Kau are inadmissible hearsay. Furthermore, none of the hearsay exceptions relied on by plaintiffs – i.e., co-conspirator or party admission exceptions – apply. The co-conspirator exception fails for the same reasons already enunciated above. As for the party admission exception, while it is true that the statements at issue were made by Mr. Kau in his representative capacity for NTC, the statements as relayed in the newspaper articles simply do not bear sufficient indicia of reliability such that the party admission exception is warranted. The court finds newspaper articles, even the direct quotes contained within them, to be inherently unreliable. Moreover, there is proof of such unreliability here. As Mr. Kau testified, his comments were translated into English from the Chinese language, and the content of the statements as written does not accurately reflect the content of Mr. Kau's statements to the articles' authors. See Benjamin Reply Decl., Ex. A at 112-15. Accordingly, NTC's objections to the articles on hearsay grounds, are sustained.

Even if Mr. Kau's statements in the newspaper articles in question were to be considered substantively, the court would nonetheless find that they do not constitute direct evidence of NTC's participation in a conspiracy to cut DRAM production or fix DRAM prices. It is true enough that the statements attributed to Mr. Kau in the articles deal with the concept of cutting DRAM production. See Sampson Decl., Exs. 22-24. However, Mr.

Kau's statements are not statements that explicitly concede the existence of any actual agreement to limit production of DRAM, nor are they statements that would lead to such a conclusion without need of any inferences. For example, in the first EBN article, Mr. Kau said only that everyone was feeling the need to cut production, but that "as of how to engage in the cut is an issue that needs to be discussed." See id. at Ex. 22. This statement expressly leaves open the question of whether NTC would choose to limit production, and if so, how it would do so. Similarly, in the first Financial Times article, Mr. Kau is referenced as stating that DRAM rivals had approached NTC about coordinating output cuts, but he is also referenced as stating that any moves would have to be led by other producers, that "leading by example was more important than attempts to coordinate, and that [NTC] would be 'willing to cut production voluntarily, once we have got the right signal.'" See id. at Ex. 23. This, too, expressly leaves open the possibility of a voluntary production cut *independent of* any joint attempt to coordinate production cuts.[4] Finally, with respect to the last article Financial Times article cited by plaintiffs, while Mr. Kau may have engaged in the unwise strategy of joking about the future existence of a "D-Pec", there is simply nothing in the article that indicates NTC's participation in an actual agreement or conspiracy to limit production or raise prices.

In sum, as with the emails and the evidence of Mr. Kau's deposition testimony, none of the news articles or Mr. Kau's statements therein constitute direct evidence of NTC's participation in the conspiracy alleged by plaintiffs. Accordingly, the court finds that plaintiffs have not presented any direct evidence that successfully defeats NTC's motion for summary judgment.

3. Circumstantial Evidence of Conspiracy

The above conclusion brings the court to the central issue raised by the parties –

[4] As defendants note, even conscious parallelism – i.e., a company's independent and voluntary decision to track prices and production of competitors – is not unlawful standing alone. See, e.g., Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan, 203 F.3d 1028, 1032 (8th Cir.).

whether there is sufficient circumstantial evidence of NTC's participation in an agreement to fix the ultimate price of DRAM, whether via participation in a coordinated output reduction or discussions regarding pricing. Keeping in mind the Matsushita standards enunciated above, the critical question in evaluating this issue is "whether all the evidence considered as a whole can reasonably support the inference that [NTC] conspired with the admitted conspirators to fix prices." See In re Citric Acid, 191 F.3d at 1097.

Plaintiffs generally point to three categories of evidence that they claim supports an "inference" of collusive conduct sufficient to preclude summary judgment: (a) economic evidence; (b) evidence of NTC's "frequent, high-level communications" correlated to specific collusive behavior; and (c) evidence of several co-defendants' guilty pleas in the DOJ's related criminal antitrust proceedings.

a. economic evidence

Plaintiffs contend that two types of economic evidence in this case demonstrate that a conspiracy makes economic sense and is plausible. First, plaintiffs point to evidence regarding the structure of the DRAM market as a whole, and specifically to their expert, Dr. Roger Noll, whose report and testimony plaintiffs assert establishes that the conditions of the DRAM market made NTC's participation in the alleged conspiracy economically viable and productive.[5] Second, plaintiffs point to evidence that they claim proves that NTC's behavior was consistently anticompetitive and against its own economic self interest – thereby further supporting the inference of NTC's participation in the conspiracy. See, e.g., Zoslaw v. MCA Distrib. Corp., 693 F.2d 870, 884 (9th Cir. 1982)("plaintiff must demonstrate that [allegedly parallel acts] were against each conspirator's self-interest").

[5] Originally, Dr. Noll's report was submitted in connection with the Winbond entity defendants' accompanying motion for summary judgment, and plaintiffs relied on that submission in citing to the report. Winbond withdrew its motion, however, following its settlement with plaintiffs, thereby withdrawing the Noll report from consideration as well. In order to cure this problem, and at the court's request, plaintiffs re-submitted Dr. Noll's report by way of a separate declaration. The Nanya entity defendants have now filed objections to the re-submission of Dr. Noll's expert report, in part based on timeliness issues. The court hereby OVERRULES defendants' objections.

i. structure of the DRAM market

Dr. Noll, plaintiffs' expert, analyzed five key characteristics of the DRAM industry – concentration in the industry, defendants' market share, DRAM's commodity status, the size of DRAM buyers/transactions, and the effect of US anti-dumping restrictions on DRAM pricing – and concluded that the DRAM industry was favorable to successful collusion during the relevant class period. See Saveri Decl., Ex. A at 31-46. Although this testimony standing alone does not necessarily implicate NTC's individual participation in any such collusion, plaintiffs also point to the testimony of NTC's expert, Dr. Alan Cox, on which plaintiffs rely for support of their claim that NTC's increasing technological advantages at the time of the conspiracy provided an economic reason for the top DRAM manufacturers to include NTC in their conspiracy, even if NTC was a smaller player in the market for DRAM. See, e.g., Declaration of Alan Cox in Support of Nanya's Motion for Summary Judgment ("Cox Decl.,"), Ex. A at ¶ 78 (noting that "Nanya/Nanya USA gained a significant advantage" due to "product innovation" in 2001). Given both the DRAM market's receptiveness to collusion and the significance of NTC's position in the market, plaintiffs contend that the economic evidence regarding the structure of the market supports NTC's participation in the alleged conspiracy.

As plaintiffs note, persuasive authority suggests that evidence bearing on the economic structure of the market, and evidence specifically suggesting that particular characteristics of the market are conducive to the creation of, and participation in, an overarching price-fixing conspiracy, can be relevant in supporting an inference that a defendant participated in such a conspiracy. See, e.g., In re Flat Glass Antitrust Litig., 385 F.3d 350, 360 (3d Cir. 2004)("[e]vidence that the defendant had a motive to enter into a price-fixing conspiracy means evidence ... that the structure of the market was such as to make secret price-fixing feasible"); In re High Fructose Corn Syrup Antitrust Litigation, 295 F.3d 651, 655-56 (7th Cir. 2002). Nonetheless, while relevant, the economic evidence surrounding the DRAM market is not, in and of itself, a sufficient basis upon which to infer a

conspiracy here. See, e.g., In re Flat Glass, 385 F.3d at 360 n. 12 ("this type of economic evidence is neither necessary nor sufficient to conclude that sufficient proof of an agreement exists to preclude summary judgment, but it is relevant and courts should as a general matter consider it"). This conclusion is strengthened by the observation that, despite plaintiffs' reliance on Dr. Cox's testimony regarding NTC's technological capacities, Dr. Cox's actual conclusion was that it was *unlikely* that other defendants would have wanted to include NTC in the conspiracy, since NTC's capacity for DRAM production was never greater than 6% of industry capacity during the class period, and less than 1.5% when the conspiracy purportedly began. See Cox Decl., Ex. A at ¶ 14. Plaintiffs present no other testimony that supports the conclusion that the structure of the market would have been receptive to *NTC itself* engaging in a conspiracy.

In sum, plaintiffs' evidence regarding the structure of the DRAM market, even if relevant to the larger question whether an inference of conspiracy may be made on the whole cannot, standing alone, conclusively establish an inference of conspiracy.

ii. anticompetitive behavior

Plaintiffs also claim that the economic evidence discloses that NTC behaved in an anticompetitive manner during the conspiracy period, such that an inference of conspiracy is reasonable. Specifically, plaintiffs assert that during the conspiracy period, NTC reduced its DRAM output in coordination with the top 5 DRAM producers in the industry; that NTC failed to price aggressively and consistently passed up opportunities to undercut its competitors and grow its market share; and that NTC refused to bid in an auction held by Compaq in November 2001. See Opp. Br. at 19:13-22:17.

Output reduction. Plaintiffs assert that NTC reduced its DRAM output during the fourth quarter of 2001 ("2001Q4") and the first quarter of 2002 ("2002Q1"), in step with the top DRAM producers and other co-conspirators. They rely specifically on Exhibit 10 of Dr. Cox's expert report, which consists of a chart comparing NTC's DRAM output growth during the conspiracy period with that of the top 5 DRAM manufacturers (defined as Elpida,

Hynix, Infineon, Micron and Samsung). See Cox Decl., Ex. A at Ex. 10. The chart demonstrates that, during 2001Q4 and 2002Q1, NTC's DRAM output growth dropped, at the same time that the top 5 DRAM producers' output growth also collectively dropped. Id. Plaintiffs argue that this supports an inference of conspiracy, since the timing of NTC's output reduction coincided with the conspiracy period.

Naturally, NTC disputes the significance of the evidence. NTC points out that NTC's own actual output data – which was not used in compiling Dr. Cox's exhibit 10 – indicates that between October 2001 and March 2002 (e.g., during 2001Q4 and 2002Q1), NTC's output of finished DRAM wafers ("wafer outs") actually increased, with the exception of only November 2001 and February 2002. See Reply Declaration of Vincent O'Brien in Support of Nanya's Motions for Summary Judgment ("O'Brien Reply Decl."), Ex. A, E. Similarly, NTC's sales grew, instead of fell, from the fourth quarter of 2001 to the first quarter of 2002. See id. at Ex. B. To the extent that November 2001 and February 2002 saw any decline in "wafer outs," NTC submits that the declines were due in part to "yield" issues (i.e., a decline in the amount of viable DRAM chips that NTC was able to produce from raw wafers), as NTC shifted production from 128 Mb of DRAM to 256 Mb of DRAM. See O'Brien Reply Decl., Ex. A.; Ex. C at NTC 65-00006200; Ex. E at NTC 73-00022899-22922; Ex. F at NTC 73-00037436.

Generally speaking, evidence that a defendant reduced production at the same time as other admitted members of an alleged conspiracy may be relevant on the question of conspiratorial conduct. See In re Petroleum Prod. Antitrust Litig., 906 F.2d 432, 460-62 (9th Cir. 1990) (considering conspiracy allegations based in part on supply reduction); see also, e.g., In re Citric Acid, 191 F.3d at 1102 (evidence of parallel pricing decisions undertaken by defendant also relevant to conspiracy question, in conjunction with other "plus" factors). Here, however, the evidence ultimately does not support the inference of a conspiracy. This is because defendants have articulated a plausible competitive justification for any production cut. As they point out, although there were wafer out production declines in

November 2001 and February 2002 – periods that fall within 2001Q4 and 2002Q1 as indicated in exhibit 10 to the Cox report – those production declines appear to be attributable to root causes. The November 2001 decline, for example, corresponded with NTC's decreased production of 128 Mb DRAM chips, as its second fabrication plant switched over to 256 Mb DRAM chips, and its first fabrication plant, which was focusing on the 128 Mb DRAM chips, experienced yield problems. See O'Brien Reply Decl., A; Ex. C at NTC 64-00006200; Ex. E at NTC 73-00022899-22922; Ex. F at NTC 73-00037436. The February 2002 decline also occurred in tandem with reported yield problems. See id. at Ex. D at NTC 64-00012021; Ex. G at NTC 73-00008704-8709.

Not only does this evidence demonstrate a plausible justification for NTC's 2001Q4 and 2002Q1 decreased wafer out DRAM production, but the justification is made more plausible by Mr. Kau's testimony, noted elsewhere herein, that NTC did not cut its DRAM production pursuant to any agreement to do so. See Benjamin Reply Decl., Ex. A at 160-161.

In the face of this evidence, plaintiffs must "provide specific evidence tending to show that the defendant was *not* engaging in permissible competitive behavior." See, e.g., In re Citric Acid Litig., 191 F.3d at 1094. In other words, as explained in the legal standard section above, plaintiffs' evidence must tend to *exclude* the possibility of independent behavior. Id. at 1096. Here, plaintiffs' evidence of output reduction – the sum total of which appears to be evidenced by Exhibit 10 to the Cox report – does not, in the face of the evidence demonstrating a production shift to 256 Mb chips at one of NTC's fabrication plants, and yield problems, tend to exclude the possibility that NTC, acting independently, suffered declines as a result of internal decision-making, rather than a coordinated effort at output reduction.

NTC's failure to price aggressively and grow market share. Plaintiffs also contend that NTC failed to price aggressively during the conspiracy period and consistently passed up opportunities to undercut competitors and grow its market share, something NTC would

have done if it had been behaving competitively. See Opp. Br. at 20:23-24. Plaintiffs rely for support on three exhibits produced from non-NTC sources, relaying through emails and spreadsheet notes, NTC's supposed price quotes for DRAM at different points in November and December 2001. Plaintiffs point out that the prices quoted therein show that NTC's DRAM price was among the highest among competitors, and that NTC would not come down from the price of DRAM it was quoting to Dell Computers, despite Dell's desire to negotiate a lower price. See Sampson Decl., Exs. 63, 116, 118.

Preliminarily, the court once again confronts NTC's hearsay objections, which NTC has submitted in response to all three exhibits. The court is of the opinion that all three constitute inadmissible hearsay. For the reasons already described in connection with plaintiffs' direct evidence of conspiracy, plaintiffs' invocation of the co-conspirator exception does not save the evidence. See Fed. R. Evid. 801(d)(2)(E). Nor does plaintiffs' invocation of other hearsay exceptions, as the court finds that the statements contained in the exhibits do not bear on the declarants' state of mind, and there is insufficient foundational testimony upon which to base application of the business records exception. See, e.g., Plaintiffs' Summary Responses to Winbond and Nanya Defendants' Objections to Exhibits, Ex. C. Furthermore, none of the documents exhibit any indicia of reliability that would incline the court toward admitting the documents. Accordingly, the court hereby sustains NTC's objections to the documents.

Even if the court were to consider the documents substantively, it would still decline to find that the evidence supports an inference of collusive behavior. To begin with, none of the documents compel the conclusion that plaintiffs urge upon the court – i.e., that NTC consistently passed up opportunities to grow market share by lowering prices. The statements contained in the documents show only that: (1) on December 19, 2001, David Lin, an Elpida employee, had been told by one of his "buddies" that NTC was quoting a "$21/$42" DRAM price that NTC wanted to raise in January; (2) that Mr. Lin was also aware that back on November 23, 2001, NTC had tried to "increase pricing" but failed; and (3) that

earlier still, on November 8, 2001, Mr. Lin had "polled the market" and discovered that NTC would not be moving on price. See Sampson Decl., Exs. 63, 116, 118. These statements indicate, at most, that someone at NTC told Mr. Lin that NTC had a desire to raise prices. But they do not establish or even suggest whether NTC actually did, in fact, raise prices, or, to the contrary, whether NTC refused to raise prices, or refused to compete for Dell's business by lowering price. Nor does the evidence indicate whether NTC had a habit of passing up opportunities to increase market share, as plaintiffs contend. Indeed, NTC points to evidence that demonstrates the opposite – that, during the same time period, NTC *increased* both overall DRAM production and total sales of DRAM (accomplished through NTC USA). See O'Brien Decl., Ex. B; O'Brien Reply Decl., Ex. E.

Moreover, plaintiffs do not rely on any legal authority that requires a defendant to have affirmatively engaged in undercutting competitors in order for the court to consider that defendant as having acted competitively. Although plaintiffs cite most persuasively to In re Citric Acid, the Ninth Circuit there did not hold that undercutting competitors is generally evidence of competitive behavior, let alone did it hold that lack of evidence as to a defendant affirmatively undercutting its competitors supports an inference of uncompetitive behavior. It simply held that, in the case before it, evidence that defendant priced aggressively in its actual contracts and had gained market share by consistently underpricing its competitors in the price-fixed market, was sufficient to demonstrate the possibility that defendant acted legally in its pricing decisions. See 191 F.3d at 1103.

Here, by contrast, plaintiffs' evidence – which does not conclusively indicate whether NTC priced aggressively with respect to Dell, or whether it had a policy of pricing aggressively – fails to exclude the possibility that NTC was acting competitively as a whole, particularly in view of the fact that the evidence does indicate that NTC's sales and production were increasing. As such, it simply cannot be said that, based on the three exhibits relied on by plaintiffs, they have sufficiently excluded the possibility that NTC was acting competitively and in its own self-interest.

Compaq auction. Finally, plaintiffs point to NTC's purported refusal to bid in a DRAM auction held by Compaq, as proof that NTC was engaged in behavior against its own self-interest, and therefore that an inference of conspiratorial activity may be made. See Sampson, Ex. 93 at 173:4-177:2 (deposition testimony of Ken Hurley, Nanya USA's President). On its face, however, this evidence cannot support an inference of collusive activity by NTC. The evidence – which is the sole basis for plaintiffs' claim – refers to *NTC USA*'s refusal to participate in the Compaq auction, not NTC's. And since, as discussed previously, NTC USA's actions here may not be imputed to NTC for liability purposes, the evidence fails to raise a material dispute of fact with respect to NTC's participation in the alleged conspiracy.

In sum, the court concludes that none of the 'economic' evidence relied on by plaintiffs supports an inference of collusive activity on NTC's part. This is true whether the evidence is viewed independently, or in the aggregate, as the evidence simply does not tend to exclude the possibility that NTC acted in a competitive manner.

b. NTC's "frequent, high-level communications"

Besides the economic evidence, plaintiffs also rely on evidence of NTC's allegedly frequent communications with the other co-defendants as circumstantial evidence that supports an inference of collusive activity. Specifically, plaintiffs point to communications that took place throughout five different periods: summer 2001; fall 2001; November 2001; December 2001/January 2002; and early 2002 through June 2002. All of these communications, argue plaintiffs, corresponded with collusive activity taking place in the DRAM market.

The communications themselves are extensive. For each of the periods mentioned, plaintiffs cite to numerous emails or correspondence between the Nanya defendants and various other defendants, detailing alleged exchanges of information and meetings between the parties, all of which purportedly track the defendants' alleged production cuts and price increases. See, e.g., Sampson Decl., Exs. 15, 22, 46, 55, 57, 86, 94, 103

Appendix A, 105-112, 114-125, 127-129, 132-34.

Despite its volume, however, there exist fundamental problems with the evidence. Namely, the communications relied on by plaintiffs are largely irrelevant as far as NTC is concerned. For the vast majority of the "high-level" communications relied upon by plaintiffs concern NTC USA, not NTC. See, e.g., id. at Exs. 94, 103 Appendix A, 105, 106, 111-12. Once again, for the reasons already outlined, NTC USA's contacts cannot be imputed to NTC. As such, to the extent this is true, the court disregards those communications dealing with NTC USA.

This leaves the court with exhibits such as 46, 57, and 120 to the Sampson Declaration. These exhibits are communications made within Mosel Vitelic, discussing or reiterating the prices applicable to "Nanya's" DRAM. Preliminarily, it is not clear whether the communications even refer to NTC as opposed to NTC USA, as they by refer only to "Nanya" generally. More importantly, however, these exhibits do not constitute probative information that tends to exclude the possibility of permissible competitive conduct. At best, they merely repeat pricing information that has presumably been relayed to the sender by a marketing director at NTC. See id. at Ex. 46. But there is nothing inherently wrong with a company's marketing director sharing pricing information with another company. See In re Citric Acid,191 F.3d at 1103, citing In re Baby Food, 166 F.3d 112, 126 (3d Cir. 1999)("[C]ommunications between competitors do not permit an inference of an agreement to fix prices unless 'those communications rise to the level of an agreement, tacit or otherwise.'"); Rutledge v. Elec. Hose & Rubber Co., 327 F. Supp. 1267, 1271 (C.D. Cal. 1971)("Absent an agreement to fix prices, there is nothing unlawful about competitors meeting and exchanging price information or discussing problems common in their industry, or even exchanging information as to the cost of their product.").

This same analysis applies to other exhibits relied on by plaintiffs, which constitute communications and correspondence that do not expressly implicate NTC – or even come from NTC – but at most refer to "Nanya" generally. See, e.g., Sampson Decl., Exs. 116-

119.

Accordingly, even crediting the three exhibits as referring to NTC rather than NTC USA as evidence, they still do not provide a basis from which the court may infer conspiratorial activity. Thus the court rejects the evidence of "high-level" communications as circumstantial proof that NTC engaged in collusive activity.

c. guilty pleas

Finally, plaintiffs urge the court take notice of certain guilty pleas that other co-defendants have entered into, as well as the fact that NTC USA's employees invoked the Fifth Amendment during their depositions.

First, as NTC points out, it is improper for the court accept evidence of the co-defendants' guilty pleas as evidence tending to support an inference of NTC's collusive activity when none of those guilty pleas implicated NTC in their criminal activity. Given that NTC was not implicated, the court declines to consider these pleas as evidence bearing on NTC's participation in the alleged unlawful activity.

Second, and with respect to any adverse inferences to be drawn from the testimony of NTC USA's employees, the fact remains, as noted above, that there is simply no basis here upon which to impute NTC USA's actions or testimony to NTC. Accordingly, the court similarly declines to draw an adverse inference as to NTC's participation in the alleged conspiracy, based on testimony or lack of testimony of NTC USA employees.

Accordingly, the court does not find that the evidence of other co-defendants' guilty pleas, or the invocation of 5th Amendment protection by NTC USA employees, supports an inference of collusive activity with respect to NTC.

* * *

In conclusion, and having considered plaintiffs' circumstantial evidence, individually and in the aggregate, the court simply cannot find that the evidence relied on by plaintiffs supports an inference of collusive activity on NTC's part, under the standard contemplated by Matsushita. Accordingly, the court hereby GRANTS summary judgment in NTC's favor.

C. NTC USA's Motion for Summary Judgment

NTC USA makes the same general argument that NTC made – i.e., that there is no evidence of NTC USA's involvement in the alleged conspiracy to fix the market prices for DRAM. NTC USA's focus, however, is slightly different than NTC. Since NTC USA does not actually manufacture DRAM, but only buys and sells the DRAM manufactured by its parent corporation, NTC USA does not address proof of conspiracy via concerted output reduction. Rather, it focuses on plaintiffs' ability to prove a section 1 violation via an actual agreement to fix prices, or an exchange of price information among defendants. NTC USA argues that plaintiffs cannot demonstrate NTC USA's participation in either activity. It contends that, not only is the evidence insufficient to prove an agreement or an exchange of information, but the evidence does not even support the conclusion that DRAM pricing was affected by any of NTC USA's actions.

Before weighing the evidence of NTC USA's participation in conspiratorial activity, the court preliminarily addresses two of the arguments raised by NTC USA. First, whether the court should employ a rule of reason analysis. NTC USA relies on Dr. Noll's report and testimony, and argues that the analysis therein demonstrates that plaintiffs have rejected a price-fixing claim in favor of alleging an unlawful exchange of price information. This type of activity, asserts NTC USA, is not subject to per se treatment, but rather to a rule of reason analysis.

The court declines this invitation, however. Plaintiffs have alleged that all defendants participated in an agreement to fix, raise, and maintain the price of DRAM, and that, in order to effectuate that agreement, defendants engaged in numerous actions, including a coordinated reduction in DRAM output, as well as engaging in meetings and discussions with each other regarding price. See Third Consolidated Amended Class Action Complaint, ¶ 61-64. Dr. Noll's expert report is but one of the types of evidence on which plaintiffs rely to support the allegation of collusive activity. See, e.g., Saveri Decl., Ex. A at 2-6. And while NTC USA is correct, as stated in Dr. Noll's report and testimony,

that plaintiffs assert that NTC USA unlawfully exchanged price information, such testimony and evidence is consistent with plaintiffs' allegation that NTC USA did so *in a manner consistent with an overriding agreement* to fix price and reduce supply.[6] And such allegations, if proven, support per se treatment. See United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); see also In re Petroleum Prods. Antitrust Litig., 906 F.2d 432, 445-50 (9th Cir. 1990)(proof that competitors shared price information treated as evidence of per se illegal conspiracy to fix prices). In sum, while plaintiffs' ability to prove NTC USA's involvement in the alleged conspiracy remains to be seen, there is simply no basis upon which to deviate from the well-accepted principle that a conspiracy to fix prices – even if effectuated in part by an exchange of information regarding price – is worthy of per se treatment.

Second, the court addresses NTC USA's intimation that it cannot be held liable for an unlawful conspiracy to reduce output, as alleged by plaintiffs in their complaint, because it does not actually manufacture any DRAM, but rather buys and sells DRAM obtained from its parent company NTC. While this may be true, it is not exculpatory. It is well-settled, as a principle of co-conspirator liability, that even if NTC USA did not itself engage in a reduction in DRAM output, it may nonetheless be held liable for the actions of other co-defendants in reducing their DRAM output, if it is proven that NTC USA otherwise participated in an unlawful conspiracy with those defendants. See, e.g., BBD Transp. Co., Inc. v. Southern Pac. Transp. Co., 627 F.2d 170, 173 (9th Cir. 1980)("To be liable as a co-conspirator for the anticompetitive acts of [other co-conspirators], the railroads need not have known of or participated in those acts themselves.").

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[6] Moreover, contrary to NTC USA's characterization of Dr. Noll's testimony, what Dr. Noll actually said was that plaintiffs' collusion allegations can include the exchange of information regarding price, *in addition to* "a naked price fixing agreement." See Benjamin Decl., Ex. W at 164:3-17. This supports, rather than undercuts, the application of per se analysis here. To the extent, therefore, that NTC USA's arguments address the need for plaintiffs to establish harm or impact on the market, as part of a rule of reason analysis, NTC USA's arguments are irrelevant. See, e.g., National Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 690 (1978)(rule of reason requires analysis of alleged conduct's effect on market).

Having dispensed with these preliminary issues, the salient issue as to NTC USA remains: whether there is any direct or circumstantial evidence that NTC USA participated in any unlawful conspiracy to fix, maintain, or stabilize, the price of DRAM.

NTC USA asserts, not only that the evidence does not support plaintiffs' allegations against it, but that the evidence affirmatively answers this question in the negative. NTC USA points, for example, to the various testimony of other co-defendants' employees, in which every single one states that they had no pricing communications with NTC USA. See Benjamin Decl., Exs. A-S. It also points to the testimony of its expert, Dr. Cox, noting NTC USA's small market share, stating that NTC USA was expanding its business during the relevant time period, rather than restricting it – as would be consistent with anticompetitive behavior – and further opining that NTC USA was committed to aggressive and competitive pricing. See Hurley Decl., ¶ 7. NTC USA even relies on Dr. Hall's testimony, in which he acknowledges that Micron, an admitted co-conspirator, testified that it was *unsuccessful* in getting Nanya USA President Ken Hurley to go along with it in its bid to raise prices. See Benjamin Decl., Ex. Y. All of which, according to NTC USA, points to an utter lack of evidence tying it to the conspiracy alleged by plaintiffs.

This evidence is sufficient to switch the burden to plaintiffs to come forward with either direct or circumstantial evidence that creates a material issue of fact regarding NTC USA's involvement in the alleged section 1 conspiracy. Plaintiffs attempt to meet this burden with the same argument and evidence that was submitted in response to NTC's motion. As it did in connection with NTC's motion, the court has attempted to distinguish the evidence where it is clear that it relates to NTC USA specifically.

1. Direct Evidence of Conspiracy

Plaintiffs' "direct" evidence of NTC USA's participation in the overarching DRAM conspiracy is largely the same as that which was discussed in connection with NTC's motion. Namely, that NTC USA participated in "secret" meetings with its fellow Taiwanese manufacturers to discuss cutbacks and price increases.

For support, plaintiffs rely for the most part on the same evidence already discussed – i.e., Micron emails, and news articles in which NTC's president, Mr. Kau, is quoted. See Sampson Decl., Exs. 13-15, 22-24, 86. Substantively, this evidence fails for the same reasons discussed in connection with NTC's motion. In addition, however, the evidence fails because it relates to the actions of NTC and NTC's President, *not* directly to NTC USA, or NTC USA's president, Kenneth Hurley. And, as stated above, NTC USA cannot be liable for NTC's acts and events without proving some theory of liability that would allow such a conclusion, which plaintiffs have not done.

This is not to say that plaintiffs have submitted *no* evidence specific to NTC USA. For plaintiffs also rely on an email that indicates that a meeting was scheduled for November 2001 between Mr. Kau, Mr. Hurley, and Mike Sadler, among others. See Sampson Decl., Ex. 87. Mr. Sadler was a Micron executive, alleged by plaintiffs to be the "ringleader" of the conspiracy.

The court does not find this email, however, to be direct evidence of NTC USA's participation in the alleged conspiracy. To begin with, it requires the court to draw the inference that the alleged meeting actually took place, for the email itself only indicates that such a meeting was scheduled. See In re Citric Acid Litig., 191 F.3d at 1093 (direct evidence of conspiracy requires no inferences). Although this deficiency is not critical, given that NTC USA has conceded the meeting's existence, see NTC USA Reply Br. at 3:1-9, the fact that NTC USA points to evidence establishing a legitimate business reason for the meeting *is* critical. Specifically, NTC USA points to the deposition testimony of Mr. Kau, Mr. Hurley, and Mr. Appleton – Micron's president who was also at the meeting. All testify that the purpose of the meeting was to discuss the possibility of technological collaboration between the two entities, since NTC USA's original licensor was exiting the DRAM business. See Benjamin Reply Decl., Ex. A at 76-80; Ex. I at 72-75; Ex. K at 187-88. Moreover, none of the deponents recall that any discussions regarding DRAM pricing took place at the meeting. See id. Plaintiffs submit no evidence that actually refutes these

facts. In view of this, the court does not find that the email relied on by plaintiffs constitutes direct evidence of NTC USA's participation in the overarching conspiracy.

Accordingly, with no other evidence to rely on, the court concludes that plaintiffs have not submitted sufficient direct evidence of NTC USA's participation.

2. Circumstantial Evidence of Conspiracy

The court next turns to plaintiffs' circumstantial evidence connecting NTC USA to the alleged conspiracy. In turning to this evidence, the court is mindful once again that the principles espoused in Matsushita, as reaffirmed by the Ninth Circuit in In re Citric Acid, apply.

Preliminarily, NTC USA has come forward with evidence that its participation in the alleged conspiracy would be economically implausible. It points to its small market share, which ranged from 1.4% in 1999 to 5.5% in 2002 at the end of the class period; the fact that with such a small market share NTC USA could not be expected to have had an impact on the market for DRAM by its participation in any conspiracy; Dr. Noll's supporting explanation that price collusion is not possible unless a seller involved in the collusion represents a significant portion of the market share (e.g., 40 to 60 percent); and the fact that NTC USA was pricing aggressively during the time period in question. See, e.g., Cox Decl., Ex. A at 10, ¶¶ 7-11; Benjamin Decl., Ex. Y at 7, Ex. W at 183:16-22; Hurley Decl., ¶ 7. The court finds this evidence sufficient to shift the burden to plaintiffs, who must, in order to defeat summary judgment, come forward with evidence tending to exclude the possibility that NTC USA was engaging in permissible competitive behavior. See In re Citric Acid, 191 F.3d at 1094. In other words, plaintiffs must introduce evidence sufficient to exclude the possibility of independent conduct by NTC USA, such that an inference of collusion is reasonable. See id. at 1096.

Here, too, plaintiffs' circumstantial evidence largely overlaps with that already discussed in connection with NTC's motion for summary judgment. This includes plaintiffs' (a) economic evidence; (b) evidence of NTC USA's "frequent, high-level communications"

correlated to specific collusive behavior; and (c) evidence of co-defendants' guilty pleas in the DOJ's related criminal antitrust proceedings. Each category, as it relates to NTC USA, is discussed in turn.

a. economic evidence

Generally speaking, plaintiffs rely on the same economic evidence here as they did with NTC – i.e., evidence relating to the structure of the DRAM market, and evidence relating to NTC USA's anticompetitive behavior.

With respect to its evidence relating to the structure of the DRAM market, plaintiffs again rely on Dr. Noll's report and testimony, as well as Dr. Cox's testimony regarding increasing technological advances exhibited by NTC and NTC USA. The merits of the parties' competing arguments on this point – and whether NTC USA's collusion in the market would make economic sense – need not be repeated here. It is sufficient for the court to reiterate only that this evidence, while relevant, is not in and of itself a sufficient basis upon which to infer a conspiracy. See In re Flat Glass, 385 F.3d at 360 n. 12.

With respect to plaintiffs' evidence regarding NTC USA's anticompetitive behavior, however, the arguments and evidence related to NTC USA are slightly different. Contrary to their arguments with respect to NTC, plaintiffs here do not submit evidence that NTC USA reduced its output of DRAM. As already noted, they cannot, since NTC USA did not actually manufacture DRAM, but rather purchased it from NTC.

Plaintiffs do argue that, as with NTC, NTC USA (1) failed to grow its market share by pricing aggressively, and (2) failed to compete by refusing to bid in an auction held by computer manufacturer Compaq. However, the analysis of these two claims is slightly different with respect to NTC USA.

Failure to grow market share/price aggressively. For proof of NTC USA's failure to price aggressively and grow market share during the relevant time period, plaintiffs rely on the same documents as they did with respect to NTC's motion – i.e., the three exhibits produced from non-NTC sources, relaying through emails and spreadsheet notes NTC's

supposed price quotes for DRAM at different points in November and December 2001. Plaintiffs, once again, are seeking to prove that the prices quoted therein show that NTC USA's DRAM price was the highest among competitors, and that NTC USA would not come down from the price of DRAM it was quoting to Dell Computers. See Sampson Decl., Exs. 63, 116, 118.

As the court has already found, these documents constitute inadmissible hearsay, and are therefore inadmissible. Moreover, even if substantively admitted, they would not support an inference of conspiracy, as they do not actually demonstrate NTC USA's failure to price aggressively and grow market share.

Most significantly, however, plaintiffs' argument on this point fails because they have not disputed the most fundamental point argued by NTC USA – that, during the class period, NTC USA actually succeeded in *increasing* sales and market share. See, e.g., Cox Decl., ¶¶ 13-14. Without disputing this point, plaintiffs cannot demonstrate NTC USA's failure to grow market share, or otherwise support any inference of conspiracy whatsoever. See In re Citric Acid, 191 F.3d at 1102 (lack of evidence in record establishing that defendant's market share stayed the same required conclusion that inference of conspiracy was "necessarily unreasonable").

Accordingly, plaintiffs' lack of evidence on this point does not enable the court to infer that NTC USA conspired with any co-defendants in unlawful section 1 activity.

Compaq auction. Plaintiffs assert that NTC USA's anticompetitive behavior with respect to the Compaq auction supports an inference of conspiracy. Specifically, plaintiffs contend that NTC USA refused to bid in the Compaq auction – which was held in order to attempt to procure DRAM at lower prices – pursuant to the DRAM cartel's goal of ensuring that no competitor bid in the auction, thereby keeping the prices for DRAM high. See Opp. Br. at 21:13-14.

This evidence, too, fails. NTC USA's president, Mr. Hurley, specifically states that NTC USA had a policy in place that forbid it from bidding in auctions, including the Compaq

auction. See Hurley Decl.,¶¶ 8-9. Mr. Hurley testified that the no-bid policy was prompted by the potential for market forces to intervene between auction and delivery of DRAM to create a loss for the manufacturer. See id. This is a plausible explanation for NTC USA's refusal to bid in the auction.

In response, plaintiffs contend that the no-bid policy was inherently anticompetitive, but present no authority for this conclusion. Nor do they submit contrary evidence establishing that Mr. Hurley's explanation is purely pretextual. Indeed, plaintiffs offer only speculation, and a series of rhetorical questions (i.e., why wouldn't Nanya USA make an "exception" in the case of the Compaq auction?), in their attempt to create an issue of material fact on the issue. See Opp. Br. at 21:19-21.

Based on the record before it, the court cannot conclude that plaintiffs' evidence regarding the Compaq auction sufficiently overcomes NTC USA's plausible explanation for its no-bid policy, such that an inference of collusive activity is reasonable.

b. NTC USA's "frequent, high-level communications"

Plaintiffs again rely on proof of numerous communications between and among NTC USA employees and competitors, in their effort to establish an inference of conspiracy. The communications purportedly took place throughout five different periods in 2001 and 2002, and plaintiffs assert that all can be tied to NTC USA's pricing decisions.

As a preliminary matter, the court notes that the evidence of communications relied on by plaintiffs with respect to NTC USA is of a different character than that relied on in connection with NTC. Whereas plaintiffs' submission of actual evidence with respect to NTC's contacts was slim, this is not the case with respect to NTC USA. Plaintiffs have submitted evidence with respect to the latter that indicates a much higher volume of communication and contact with other defendants.

Having reviewed all evidence submitted by plaintiffs in connection with this issue, the court finds that the evidence can generally be classified into two general categories: (i) communications from or to NTC USA regarding NTC USA's contacts with defendants; and

(ii) communications from or to non-NTC USA sources regarding NTC USA's contacts with defendants.

The correspondence from or to NTC USA sources demonstrates that numerous contacts and communications took place during the relevant period between NTC USA executives – namely, Mr. Hurley and North American Sales Director Mike Walsh – and other defendants. See Sampson Decl., Ex. 103 Appendix A, Ex. 105, Exs. 106,109-112, 114, 124; see also Benjamin Reply Decl., Ex. R. While it seems apparent that some of the evidence, when viewed for its substance, conveys only innocent information, it is equally apparent that some of the evidence conveys actions taken by NTC USA executives that may, in fact, be suggestive of collusive behavior. See, e.g., id. at Ex. 105 at 39 (describing Mr. Hurley's "chance encounter" with alleged co-conspirators), cf. Ex. 130 at 103-05 (Steve Thorsen deposition testimony re discussions with Mr. Hurley re DRAM pricing); see also In re Citric Acid, 191 F.3d at 1103 (suggesting that specific discussions between competitors regarding price may give rise to inference of conspiracy).

This also holds true with respect to the communications relied from or to non-NTC USA sources regarding NTC USA's communications with defendants. See Sampson Decl., Exs. 15, 22, 46, 55, 57, 86, 107-08, 115-123, 125, 127-129, 132-34. Some of these communications indicate innocent conduct. See id. at Ex. 133 (email from Elpida employee merely noting he had "polled the market place and found that most suppliers have moved to $38 for 128MB SDR"). Some are more suggestive. Id. at Ex. 134 (Hynix notes conveying detailed product information purportedly learned from "Nanya", including price info).[7]

[7] Defendants have lodged numerous objections to the documents discussed herein. The court notes that some of the documents relied on by plaintiffs and objected to by defendants – particularly those belonging to the first category of communications from or to NTC USA – are admissible. See, e.g., Sampson Decl., Exs. 106, 111-12. By contrast, it is unlikely that many of the documents belonging to the category of communications from or to non-NTC USA sources are admissible. See, e.g., Sampson Decl., Exs. 46, 57. The court need not rule on the admissibility of all documents submitted and at issue, however; it is enough that it finds some documents admissible and sufficient to raise a triable issue of material fact, as described above. The parties are, of course, entitled to raise objections to

As such, and given the volume of communications present, and the varying degrees to which the communications may suggest collusive activity by NTC USA, the court finds that plaintiffs have, in fact, successfully met their burden in arguing that the evidence, considered as a whole, might reasonably support the inference that NTC USA conspired with the admitted conspirators in this action, to fix the actual prices for DRAM in the marketplace. The volume of contact and communications, and the presence of at least some discussion regarding pricing, when viewed in the aggregate, and considering the fact that some of the defendants and individuals with whom NTC USA was communicating are admitted conspirators in this action, support this inference.

Accordingly, the court concludes that plaintiffs have presented a disputed issue of fact as to proof of NTC USA's involvement in the overarching conspiracy alleged by plaintiffs.

c. guilty pleas

Finally, plaintiffs once again argue that the guilty pleas entered into by other co-defendants, and the fact that three of NTC USA's employees invoked the Fifth Amendment at their depositions, further supports an inference of conspiracy. For the reasons already discussed in connection with NTC's motion, the court declines to accept the former – i.e., other co-defendants' guilty pleas – as evidence of conspiracy.

The court also comes to the same conclusion with respect to the latter. However, the court's analysis in doing so, is different than before. This is because, whereas it would *not* have been proper to draw adverse inferences against NTC based on *NTC USA* employees' invocation of the 5th Amendment, it *may* be proper draw those inferences against NTC USA.

The seminal case on the issue, Baxter v. Palmigiano, 425 U.S. 308 (1976), holds that adverse inferences are permissible in certain situations. However, lower courts interpreting Baxter have been uniform in suggesting that the key to the Baxter holding is

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evidence not ruled on herein at trial.

that such adverse inference can only be drawn when independent evidence exists of the fact to which the party refuses to answer. See, e.g., LaSalle Bank Lake View v. Seguban, 54 F.3d 387, 391 (7th Cir.1995); Peiffer v. Lebanon Sch. Dist., 848 F.2d 44, 46 (3d Cir.1988). Thus, an adverse inference can be drawn when silence is countered by independent evidence of the fact being questioned, but that same inference cannot be drawn when, for example, silence is the answer to an allegation contained in a complaint. See Nat'l Acceptance Co. v. Bathalter, 705 F.2d 924, 930 (7th Cir.1983). This interpretation is, however, premised on the basic notion that, prior to drawing any adverse inference, there must be, at a minimum, a foundation laid by the party seeking the adverse inference, as to the fact upon which such an inference should be taken.

Here, plaintiffs have not made a sufficient foundational showing regarding the specific questions and facts upon which they would like adverse inferences to be drawn. Accordingly, the court will not grant them a sort of generic adverse inference based on the mere fact that three of NTC USA's employees asserted the 5th Amendment.

* * *

In conclusion, and based on all the above, the court DENIES NTC USA's motion for summary judgment regarding its liability pursuant to section 1 of the Sherman Act. Plaintiffs have successfully demonstrated that disputed issues of fact are present with respect to NTC USA's participation in the alleged conspiracy, based on circumstantial evidence of NTC USA's contacts and communications with competitors.

D. Motion for Summary Judgment re DRAM Purchases from April 1, 2001 to November 30, 2001

Defendants seek an order declaring that plaintiffs' claims based on DRAM purchases made during the period April 1, 2001 through November 30, 2001, fail as a matter of law. Defendants contend that plaintiffs have admitted they cannot prove impact for this eight month period, and that as a result, all claims based on purchases made during this period are doomed.

Plaintiffs who bring suit for antitrust violations pursuant to section 4 of the Clayton Act must satisfy antitrust standing requirements. This standing requirement means that a plaintiff must prove that he or she has been (1) "injured in his business or property; and (2) "by reason of anything forbidden in the antitrust laws...". See 15 U.S.C. § 15(a). The first of these two elements, which is at issue here, refers to 'impact,' whereby plaintiffs must demonstrate the 'fact of damage', or the existence of injury to themselves.

The parties here do not actually dispute the fundamental legal standards applicable for analyzing antitrust 'impact'. Defendants, for instance, note the well-established maxim that impact, or injury itself, is the "sine qua non" for stating a cause of action based on antitrust conspiracy. See, e.g., McClure v. Undersea Indus., Inc., 671 F.2d 1287, 1289 (11th Cir. 1982). Plaintiffs, for their part, cite to legal authority indicating that antitrust impact is satisfied by proof that the antitrust violation alleged is a material and substantial cause of plaintiffs' injury. See, e.g., Rossi v. Standard Roofing, Inc., 156 F.3d 452, 483 (3d Cir. 1998); see also Supermarkets of Marlinton, Inc. v. Valley Rich Dairy, 1998 WL 610648, **2 fn. 18 (4th Cir. Va. 1998)(unpublished opinion)(citing with approval notion that "in order to establish the fact of injury, an antitrust plaintiff must demonstrate that it suffered 'some damage' as a causal result of the defendant's violation"). Both are accurate statements of the law. For it is true here that, in order to show impact, plaintiffs must demonstrate both that they have been injured, and that their injuries were caused by the alleged antitrust violation in question. See also In re Tamoxifen Citrate Antitrust Litigation, 2006 WL 2401244, *26 (2d Cir. 2006)(injury in fact must "flow[] from that which makes defendants' acts unlawful").

Having noted the applicable legal standards, the court must decide whether, in light of certain statements made by plaintiffs' experts, Dr. Noll and Dr. Liu, plaintiffs' claims based on DRAM purchases made from April 1, 2001 to November 30, 2001, fail for plaintiffs' inability to establish impact.

First, the court considers the evidence upon which defendants base their motion.

Defendants rely almost entirely on statements made by two of plaintiffs' experts, Dr. Noll and Dr. Liu. To begin with, defendants point to: Dr. Noll's expert report in which he states that "during most of 2001," the defendants were engaged in activity with "a different character" than that which resulted in higher prices for other periods of the alleged conspiracy; Dr. Noll's statement that this activity consisted of defendants' concerted attempt to lower DRAM prices in order to drive co-defendant Hynix out of the market; and Dr. Noll's statement that during this period, "DRAM buyers did not suffer harm from the price war" because although "[c]oordinated action to set prices below cost in order to drive a firm from the market is a form of collusion, ... an industry's customers are not harmed during the period while the concerted attempt to drive prices down takes place." See Declaration of Ross S. Goldstein in Support of MSJ re DRAM Purchases ("Goldstein Decl."), Ex. A. Second, defendants rely on Dr. Liu's expert report stating that the April 2001 to October 2001 period of the alleged conspiracy was a "predatory" period in which Dr. Liu failed to find "price elevation" and failed to find "damages." See id. at Ex. B.

The question for the court to address is what effect, if any, these statements have on plaintiffs' ability to demonstrate antitrust impact. Defendants argue that the above statements amount to judicial admissions that, for the eight month period in question, not a single member of the class suffered any injury in fact, since there was no artificially raised price at issue that could have harmed plaintiffs. Plaintiffs respond that defendants confuse proof of impact, which requires only that plaintiffs prove that the conspiracy as a whole caused some damage to plaintiffs, with proof of damages, which requires plaintiffs to demonstrate overpayments for DRAM at artificially high prices in order to recover damages. According to plaintiffs, the above statements are only relevant to the damages issue.

Neither party presents legal authority that is directly on point. Nonetheless, the court finds plaintiffs' arguments more persuasive. To begin with, defendants' request that the court carve out an eight month period from the broader three-year conspiracy period that has always been alleged by plaintiffs is counter-intuitive. See, e.g., Third Consolidated

Amended Class Action Complaint, ¶¶ 1, 37, 72. As the US Supreme Court has said in the past with respect to Sherman Act antitrust cases, and as plaintiffs point out, "[i]n cases such as [these], plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each.... [T]he character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole." See Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699 (1962). Accordingly, the court must view the conspiracy alleged by plaintiffs in its entirety.

Second, viewing the conspiracy in question as a whole, plaintiffs are correct that the question is simply whether plaintiffs can prove 'some damage' as a result of the alleged antitrust violation by defendants – i.e., whether plaintiffs can prove some damage *as a result of the alleged three-year conspiracy* engaged in by defendants. See, e.g., Supermarkets of Marlinton, Inc. v. Valley Rich Dairy, 1998 WL 610648, **2 fn. 18; In re Tamoxifen Citrate Antitrust Litigation, 2006 WL 2401244, *26 (injury in fact must "flow[] from that which makes defendants' acts unlawful"). Here, defendants do not dispute that plaintiffs have done so with respect to the three year conspiracy as a whole. See Def. Reply Br. ISO MSJ re DRAM Purchases at 3 n.1. For purposes of this motion, this satisfies plaintiffs' burden of proving that antitrust impact is present.

Moreover, plaintiffs' expert Dr. Noll also testified that the eight month period in question formed an integral part of the overall 3 year conspiracy alleged by plaintiffs, as it represents the period of time during which defendants conspired in an ultimately unsuccessful attempt to drive Hynix out of the market, in order to decrease total DRAM supply, thereby raising prices for DRAM. As such, the period in question, even though marked by lower prices on the surface that may not give rise to damages, nonetheless forms a critical part of the conspiracy that led to plaintiffs' actual injury. See, e.g., Declaration of Guido Saveri in Support of the Re-Submission of the Expert Report of Roger G. Noll ("Saveri Decl."), Ex. A at 5, 50-51 (Noll Report).

Indeed, as plaintiffs point out, In re NASDAQ Market -Makers Antitrust Litig. is instructive. There, the court specifically found that even where some class members escape injury altogether, impact may still be found on the basis of the class members' injury as a whole. See 169 F.R.D. 493, 523 (S.D. N.Y. 1996). The district court in that case said that "unless it is clear that no ultimate consumers were damaged, the exact amount each may have sustained is an issue to be treated at the damages phase of the litigation," not at the preliminary stage in deciding whether plaintiffs had adequately made out a prima facie case of impact. See id. This reasoning is relevant here. For when considering the conspiracy as alleged in its entirety, all indications are that there were at least some "ultimate consumers" who were harmed at the end of the conspiracy period by paying artificially high prices. And since plaintiffs assert that those high prices stem from all conspiratorial acts detailed by their experts – including the strategy to drive Hynix out of the market, even if it involved lower prices for awhile – there is simply no justification for finding, as defendants urge, that no liability can be premised on claims that are based on that "kill Hynix" period.

Moreover, to the extent that – as defendants point out – there are some plaintiffs who made purchases limited only to the eight month period in question and therefore truly did not suffer any impact or injury, the above reasoning is also helpful. In short, this is a factor to be taken into account at the damages phase. In other words, the lack of harm to those individual plaintiffs whose claims are limited to the eight month period at issue does not cause plaintiffs' class claims as a whole to fail where impact is undisputedly present for other class members for the whole conspiracy period. That lack of harm would, however, prevent those plaintiffs whose claims are limited to the eight months in question from recovering any damages on their individual claims, as none are present. Furthermore, as plaintiffs point out, this is an issue that is specifically contemplated – and dealt with – by Dr. Liu. Accordingly, the issue poses no barrier to allowing plaintiffs' class claims to proceed as alleged.

In conclusion, defendants present no reason for overlooking the more apt principles relied on by plaintiffs, which dictate that defendants' motion for summary judgment as to all claims based on purchases from April 1, 2001 to November 30, 2001 be, and hereby is, DENIED.

E. Motion for Summary Judgment re Purchases Based on Pre-Existing Cost Plus Contracts

Defendants seek summary judgment on all claims brought by direct purchasers who bought DRAM pursuant to pre-existing cost-plus contracts. The gist of defendants' argument is that these purchasers, who buy and then resell DRAM to indirect purchasers at a fixed mark-up over the price paid for the DRAM, have not suffered actual injury for purposes of recovery under section 1. While they acknowledge such argument would normally be ineffective under the Supreme Court's well-established prohibition on the use of "pass-on" defenses in antitrust cases, defendants rely on the narrow exception that the court has specifically carved out for qualifying cost-plus contracts.

Resolution of defendants' motion requires determination of three issues: (1) the applicable legal standards involved; (2) whether plaintiffs or defendants bear the burden of proof on this issue; and (3) whether there is, in fact, any evidence of claims brought pursuant to pre-existing cost-plus contracts.

1. Legal Standards

The general argument that a direct purchaser plaintiff does not suffer injury where that plaintiff passes on all or part of an illegal overcharge to subsequent purchasers is not new. This is frequently referred to as the "pass-on defense," and was first considered by the Supreme Court in Hanover Shoe, Inc., v. United Machinery Corp., 392 U.S. 481, 491-493 (1968). There, the court held that a pass-on defense cannot be relied on by defendants seeking to prove that a direct purchaser plaintiff was not actually injured by a violation of the antitrust laws. See 392 U.S. at 491-493. The court adhered to the "general principle" that the victim of an overcharge "is damaged within the meaning of [the antitrust

standing statute] to the extent of the overcharge." Id. at 491. It ruled against the pass-on defense, in part based on concerns that use of the defense could complicate antitrust litigation (due to problems of proof) and reduce incentives for private plaintiffs to sue.

The Supreme Court followed this holding with Illinois Brick Co. v. Illinois, in which it considered the pass-on defense, but this time from a plaintiff's perspective. See 431 U.S. 720 (1977). In Illinois Brick, plaintiffs were indirect purchasers who argued that they had antitrust standing to sue because the illegal overcharge that resulted from defendants' antitrust conspiracy had been passed on to them by direct purchasers of defendants'. Consistent with its holding in Hanover Shoe, the Supreme Court held that the principles of that earlier case also bar indirect purchasers' claims, in addition to pass-on defenses employed by defendants. The court again expressed concerns with the complexity of proof involved in any contrary rule, as well as the risk of multiple liability for defendants. See id. at 731-35.

Despite having twice rejected the use of pass-on theories – whether to demonstrate lack of injury or to allow indirect purchaser standing – the Supreme Court noted, in both cases, that an exception to the general rule is possible. That exception, at issue here, is contemplated "when an overcharged buyer has a pre-existing 'cost-plus' contract, thus making it easy to prove that he has not been damaged." See Hanover Shoe, 392 U.S. at 494; see also Illinois Brick, 431 U.S. at 736 (reiterating Hanover Shoe exception for fixed quantity, pre-existing, cost-plus contracts). The theory is that, pursuant to a pre-existing cost-plus contract, it may be possible to easily prove that 100% of an overcharge is directly passed through to an indirect purchaser, pursuant to pre-negotiated terms by which a price-fixed product is charged at cost to the indirect purchaser, the end result of which eliminates any injury borne by the direct purchaser.

The cost-plus contract exception was expressly considered in Kansas v. UtiliCorp United, Inc., 497 U.S. 199 (1990). There, the Supreme Court held that the direct purchaser is the appropriate plaintiff in virtually every case, and that the opening for the cost-plus

exception is extremely narrow. The court was dealing with a parens patriae action brought by state attorneys general ("AG"s), who sued defendant utility corporation on behalf of natural gas consumers. The AG plaintiffs argued that state regulations ensured that the utility corporation passed on 100% of the overcharge directly to the state consumers in the form of increased rates – thereby invoking the cost-plus contract exception. The court, however, declined to place the case within the cost-plus contract exception, holding that in the absence of any such physical contract, the case only "resembled" the cost-plus contract exception, which contemplates that a 100% overcharge may be proven with certainty. See 497 U.S. at 218.

The Kansas court expressly reaffirmed its adherence to the prohibition on pass-on theories, as well as the court's prior precedent regarding availability of the cost-plus contract exception. The court specifically noted and implied that the cost-plus contract exception applies where the contract in question commits the buyer to purchasing "a fixed quantity regardless of price," with the end result that "the effect of the overcharge is essentially determined in advance, without reference to the interaction of supply and demand that complicates the determination" of pass-on cost in the usual situation. Id. at 217. In other words, the court noted that it "might allow indirect purchasers to sue only when, by hypothesis, the direct purchaser will bear no portion of the overcharge and otherwise suffer no injury." Id. at 218.

Since Kansas, some circuit courts have expressed the opinion that it is doubtful whether the cost-plus exception can ever truly be used to get around the prohibition on pass-on theories. See, e.g., McCarthy v. Recordex Servs., 80 F.3d 842, 855 (3d Cir. 1996)(the "vitality of the pre-existing cost-plus contract exception is doubtful, however, in view of Utilicorp); Illinois ex rel. Burris v. Panhandle E. Pipe Line Co., 935 F.2d 1469, 1478 (7th Cir. 1991)("The Court's interpretation of the cost-plus exception appears so narrow (setting up as it does a demand for rigorous proof of a 100% pass through and then suggesting an unwillingness to consider such detailed evidence) as to preclude its

application in any case.").

There is no Ninth Circuit decision directly on point. However, prior Ninth Circuit precedent would appear to indicate that the Ninth Circuit continues to recognize the validity of the pre-existing cost-plus exception to the prohibition on pass-on theories, although this conclusion is to be inferred from dicta, as the court never actually discussed the applicability of the exception. See Lucas Automotive Engineering v. Bridgestone/Firestone, Inc., 140 F.3d 1228, 1234 (9th Cir. 1998)(noting existence of exception for pre-existing, "*fixed quantity*, cost-plus contract[s]", but refusing to discuss it as appellant failed to offer any evidence that any purchases were made pursuant to such a contract)(emphasis added).

Accordingly, based on review of controlling precedent, the court concludes that, while there *is* a pre-existing cost-plus contract exception that may theoretically be stated, the exception is to be applied extremely narrowly. It requires proof of a pre-existing cost-plus contract, pursuant to which a subsequent purchaser purchased a fixed quantity of goods. And it should only be applied where it is absolutely clear that the direct purchaser in question will bear no portion of the overcharge and will otherwise suffer no injury as a result of defendants' alleged antitrust violations.

2. Burden of Proof

Having determined that the exception for pre-existing cost-plus contracts is still legally viable, and having established the contours of the exception, the question remains whether plaintiffs or defendants have the burden of burden of proof with respect to the issue. Defendants argue that plaintiffs bear the burden of proof, since the cost-plus contract exception goes to the issue of injury in fact, an essential element for section 1 recovery, upon which plaintiffs undisputably bear the burden. Plaintiffs, by contrast, argue that defendants have it backwards: Hanover Shoe established that plaintiffs make out a prima facie case of injury merely by showing that they have been illegally overcharged, and by demonstrating the amount of the overcharge. Thereafter, it is *defendants* who bear both

the burden of production and proof as to the exception, and who must come forward here with evidence of any qualifying cost-plus contracts.

The court has found no cases that squarely address the question of who bears the burden of proof in establishing the cost-plus contracts exception. However, the language of the controlling cases themselves suggest that it is defendants, and not plaintiffs, who have the burden here of proving that this exception to the Hanover Shoe/Illinois Brick doctrine applies. A review of Hanover Shoe – the case that considered the *defensive* use of the pass-on theory – makes clear, even obvious, that the court considered that it would be defendants' burden to meet the "normally ... insurmountable" task of proving that the pass on defense applies. See, e.g., 392 U.S. at 493 (in rejecting use of pass-on defense, noting that, "if the existence of the defense [were to be] generally confirmed, antitrust *defendants* [would] frequently seek to *establish its applicability*") (emphasis added). Similarly, since defendants here seek to establish an exception that would allow a narrow form of the pass-on defense, defendants should also bear the burden of establishing its applicability.[8]

Moreover, as plaintiffs correctly point out, the Hanover Shoe court also expressly held that a plaintiff's "prima facie case of injury and damage" is satisfied "when a buyer shows that the price paid by him for materials purchased for use in his business is illegally high and also shows the amount of the overcharge." See id. at 489. As such, plaintiffs satisfy their prima facie case of injury here by demonstrating simply that plaintiffs paid an illegally inflated amount for DRAM, and by showing the amount of that overcharge. It would step beyond the boundaries of the Hanover Shoe ruling to require plaintiffs to do more than

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[8] The court's conclusion is also guided in part by the fact that the Supreme Court has specifically recognized two types of "pass-on" theories that may be used – defensive, and offensive. The defensive pass-on theory was first discussed in Hanover Shoe, where *defendants* attempted to use it to demonstrate that the direct purchaser plaintiffs had not established true antitrust injury. See 392 U.S. 481. In Illinois Brick, by contrast, the offensive use of the pass-on theory was utilized by indirect purchaser *plaintiffs* trying to establish antitrust injury for standing purposes under the Sherman Act. See 431 U.S. 720. As a practical matter, it makes intuitive sense that where – as here – defendants utilize the defensive pass-on theory, they should bear the burden of proof (and where plaintiffs employ offensive use of the pass-on theory, it is plaintiffs who bear the burden).

what the court there required – i.e., by forcing plaintiffs to establish the *absence* of any exception to the prohibition on use of the pass-on defense, in addition to demonstrating the amount of any illegal overcharge that was paid due to defendants' unlawful activities.

Furthermore, defendants' reliance on Burkhalter Travel Agency v. MacFarms Int'l, Inc. for the contrary proposition is unpersuasive. See 141 F.R.D. 144 (N.D. Cal. 1991). It is true that in that case, the court considered the cost-plus contract exception post-Kansas, and held that the exception applied. However, the court did not engage in any discussion related to the burden of proof with respect to its application. Accordingly, it does not aid the analysis here.

In conclusion, the court holds that it is defendants who must prove that the cost-plus contract exception applies. In seeking summary judgment as to this issue, therefore, defendants must produce admissible evidence demonstrating that there are no triable issues of fact regarding application of the exception. It then falls to plaintiffs to overcome defendants' evidence, with proof of materially disputed facts.

3. Evidence of Pre-existing Cost-plus Contracts

This brings the court to the final issue presented by the instant motion: whether defendants have presented sufficient evidence of qualifying cost-plus contracts to warrant application of the exception. In accordance with the standards enunciated above, to be successful, defendants must specifically point to evidence of *pre-existing* cost-plus contracts, pursuant to which subsequent purchasers purchased a *fixed quantity* of goods. See Lucas Automotive Eng'g, 140 F.3d at 1234.

Defendants rely on three sources of evidence in their attempt to meet this burden. First, they point to deposition testimony purportedly demonstrating that "several plaintiffs package DRAM as one item among a bundle of goods and services that they provide to their customers...". See Declaration of Christopher Flack ("Flack Decl."), Exs. A-E. Second, they point to "one example uncovered through discovery," of a purported qualifying cost-plus contract between Apple computer and Solectron Corporation – Solectron directly

buys DRAM from entities like defendants and uses it to manufacture products for Apple under a cost-plus pricing formula. See Flack Decl., Ex. H. According to defendants, this single contract demonstrates that Apple, as the final OEM to whom Solectron sells its products, is charged the full cost that Solectron pays for the DRAM it purchases, plus a one-percent margin over that cost. See id. at SOL000196, 163. Finally, defendants also cite to the Declaration of Michael Bokan – a director of sales for Micron – in which Mr. Bokan claims that he knows of numerous customers who purchase DRAM for resale in accordance with "cost-plus" contracts. See Bokan Decl., ¶¶ 3-4.

This evidence, however, is deficient. First, the deposition testimony relied on by defendants do not say what defendants say it does. Presumably, defendants hope to prove with the testimony that the DRAM packaged as an item can be separately tracked through to the ultimate purchaser of the item – thereby providing a foundation for application of the cost-plus contract rule. But actual review of the deposition testimony demonstrates that the deponents are nearly all testifying as to general job duties and descriptions for what their companies do. See Flack Decl., Exs. A-E. They are in no way affirmatively stating that DRAM is sold, or can be characterized, as a separate item within a bundle of goods and services. Furthermore, even if the testimony *did* support this interpretation, it would still fall short of establishing the existence of any physical, pre-existing, fixed quantity cost-plus contracts that qualify for application of the exception. Indeed, to the contrary, the testimony of one of the deponents, Steven Coraluzzi, expressly states that Mr. Coraluzzi had *no contracts whatsoever* with Crucial Technologies, a division of defendant Micron. See id. at Ex. A.

Second, with respect to the Apple/Solectron contract, neither Apple nor Solectron are named plaintiffs in the instant action. Assuming, therefore, that defendants attempt to use the Apple/Solectron contract as evidence of unnamed class members' cost-plus contracts, defendants provide no legal or other authority that would justify imputing the existence of this single agreement to other unnamed class members, or to the class as a

whole. Nor is there any reason to assume, based on this one agreement, that other unnamed class members had similar agreements. Moreover, plaintiffs raise valid arguments regarding the agreement itself. Notably, they point out that the contract does not appear to require the purchase of a fixed quantity of DRAM. See Flack Decl., Ex. H. Defendants, for their part, fail to overcome this with any evidence to the contrary. As such, it simply cannot be said that the Apple/Solectron contract qualifies as a valid pre-existing cost-plus contract.

Finally, to the extent that defendants rely on the Bokan Declaration for added support of its argument that cost-plus contracts exist, the Bokan Declaration is wholly unpersuasive. Mr. Bokan does not affirmatively point to any cost-plus contracts whatsoever. He merely states that he "believe[s] that contract manufacturers frequently agree to take no profit, or to take a fixed, cost-plus profit, on DRAM purchased for use in an OEM's products." See Bokan Decl., ¶ 3. Not only is this insufficient proof of the existence of any cost-plus contracts, but as plaintiffs point out, most of this testimony is objectionable as inadmissible hearsay. To that end, the court disregards the testimony contained therein.

In sum, it simply cannot be said that defendants have met their burden in pointing to evidence establishing that there are valid pre-existing, fixed quantity, cost-plus contracts that warrant imposition of the exception in this case.

Nor does Burkhalter Travel Agency, discussed above, require a contrary conclusion. In Burkhalter, the court considered a situation in which the plaintiff directly purchased macadamia nuts from defendants, and subsequently passed the entire cost of the macadamia nuts on to a subsequent purchaser pursuant to an existing agreement between them. Defendants argued that the cost-plus contract exception applied, and the court agreed. The court, however, assumed the existence of a qualifying cost-plus agreement. Here, by contrast, as analysis of the above evidence demonstrates, defendants have not proven the existence of any qualifying agreement, either between a named plaintiff and a

subsequent purchaser, or even between an unnamed plaintiff and a subsequent purchaser. As such, there is simply no proof that the exception applies.

Defendants attempt to avoid this inevitable conclusion by arguing that, if they lack sufficient evidence, it is only because plaintiffs thwarted their prior discovery efforts to obtain relevant evidence going to this issue. They note that, despite their seeking information relating to cost-plus contracts during discovery, plaintiffs refused to produce any, and after a motion to compel, the magistrate judge refused to order its production. See Flack Decl., Exs. F, G. To that end, defendants also seek an order from the court "soliciting the information needed to determine whether the cost-plus contract rule applies." Plaintiffs strenuously oppose this request, asserting that discovery has closed, that only one defendant – Micron – ever sought discovery on the cost-plus contracts issue in the first place, and that defendants failed to timely object to the magistrate judge's discovery ruling.

As the court stated at the hearing on this motion, these facts do present cause for concern. The court is particularly troubled by the fact that plaintiffs' counsel appears to have engaged in the practice of regularly instructing clients and deponents not to answer deposition questions regarding the existence of qualifying cost-plus contracts. See, e.g., Sampson Decl., Ex. 138 at 184. As counsel for plaintiffs is undoubtedly aware, instructions not to answer are not proper in practice before this court, unless made in response to inquiries that would require the disclosure of privileged information. The impropriety of such instructions here is made all the more striking because evidence with respect to the existence of cost-plus contracts is, as demonstrated above, unquestionably relevant to this case. As such, had the issue been properly raised before the court – and there is no indication that the issue as presently framed before the court was even raised with the magistrate judge – the court would have provided defendants with timely relief. As it stands, however, the court is left only with the present discovery record. For having made a strategic decision not to challenge the magistrate judge's earlier decision, or to raise the issue prior to the close of discovery, defendants are bound by their actions, unfortunate

though the result may be.

As such, the court is left with no choice but to conclude, based on the evidence submitted before it, that defendants have failed to present, as is their burden, evidence that there are qualifying cost-plus contracts that warrant application of the exception here. Having failed to so demonstrate, it is irrelevant whether plaintiffs present any facts that materially dispute the exception's application, as the exception itself is not before the court. Accordingly, summary judgment on the issue is DENIED.

F. Motions to Seal

The parties have also filed numerous administrative requests to seal certain documents and portions of briefs filed in connection with the present motions for summary judgment. The court has made a good faith effort to review these requests, alongside the actual exhibits to which the requests purportedly refer. However, after trying unsuccessfully to match each document sought to be filed under seal with a corresponding administrative request referring to the specific document and setting forth good cause, the court concludes that the parties' motions to seal are simply too piecemeal to lend themselves to a satisfactory determination by the court. Moreover, as the supporting declarations themselves indicate, it is not wholly clear that many of the documents justify a sealing order, under the standard enunciated in Kamakana v. City of Honolulu, 447 F.3d 1172 (9th Cir. 2006).

As such, if the parties wish the court to grant sealing requests covering certain documents or portions thereof in connection with the instant motions, the parties must (1) withdraw all pending administrative requests to seal that have been filed in connection with the instant motions; and (2) each re-file one comprehensive administrative request to seal, which specifically sets forth each individual exhibit, document, or portion thereof that the parties wish to have sealed, and which sets forth, by way of accompanying declaration, a "compelling reason" for the sealing of each individual document. See id. at 1136. Any revised request to seal filed pursuant to these instructions must be filed no later than

February 28, 2007.

If the parties' re-filed administrative requests to seal do not comply with the above, the court will deny the parties' sealing request. Alternatively, if the parties do not withdraw their pending motions or file any revised administrative requests to seal by February 28, 2007, it will treat the pending motions to seal as either denied or moot.

G. Conclusion

For the reasons stated above, the court hereby GRANTS summary judgment in part and DENIES summary judgment in part, as follows: (1) NTC's motion for summary judgment on liability under the Sherman Act is GRANTED; (2) NTC USA's motion for summary judgment on liability under the Sherman Act is DENIED; (3) defendants' motion for partial summary judgment based on DRAM purchases from April 1, 2001 to November 30, 2001 is DENIED; and (4) defendants' motion for partial summary judgment based on pre-existing cost-plus contract purchases is DENIED.

IT IS SO ORDERED.

Dated: February 20, 2007

PHYLLIS J. HAMILTON
United States District Judge